

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PERSEPOLIS ENTERPRISE, a Michigan corporation,)	No. C-07-02379 SC
)	
Plaintiff,)	ORDER GRANTING MOTION
)	<u>TO TRANSFER VENUE</u>
v.)	
)	
UNITED PARCEL SERVICE, INC., a Delaware corporation; UNITED PARCEL SERVICE, INC., an Ohio corporation; and UNITED PARCEL SERVICE, INC., a New York corporation,)	
)	
Defendants.)	
_____)	

I. INTRODUCTION

Before the Court are two motions by Defendants United Parcel Service Inc., a Delaware corporation ("UPS, Inc."), United Parcel Service, Inc., an Ohio corporation ("UPS Ohio"), and United Parcel Service, Inc., a New York corporation ("UPS New York") (collectively "Defendants" or "UPS"). In the first motion, UPS moves the Court to transfer this case to the United States District Court for the Northern District of Georgia. See Mot. to Transfer Venue, Docket No. 17 ("First Motion"). In the second motion, UPS moves the Court to dismiss the case without prejudice, stay the case pending resolution of Barber Auto Sales, Inc. v. United Parcel Service, Inc., No. 5:06-cv-04686-IPJ (N.D. Ala.) ("Barber Auto"), or to transfer the case to the United States

1 District Court for the Northern District of Alabama. See Mot. to
2 Dismiss, Transfer, or Stay, Docket No. 23 ("Second Motion").
3 Plaintiff Persepolis Enterprise ("Plaintiff" or "Persepolis")
4 opposed both motions. See Docket Nos. 26 ("First Opposition"), 29
5 ("Second Opposition"). UPS filed a consolidated Reply addressing
6 both motions. See Reply, Docket No. 31.

7 For the reasons set forth herein, the Court DENIES
8 Defendants' First Motion, GRANTS Defendants' Second Motion, and
9 ORDERS that this case be transferred to the Northern District of
10 Alabama.

11 12 **II. BACKGROUND**

13 In the Complaint, Plaintiff alleges that UPS uses a laser
14 measuring system to determine the size, and therefore shipping
15 cost, for each package, and that the measuring system is not
16 properly calibrated, which causes UPS to overcharge the franchisee
17 shippers. See Compl., Docket No. 1, ¶¶ 17-24. Based on these
18 purportedly incorrect charges, Plaintiff brought claims for breach
19 of contract, fraud, and unjust enrichment. See id., ¶¶ 31-43.
20 Plaintiff is a Michigan corporation and operates a local UPS
21 franchise. Although Plaintiff's own business is geographically
22 limited, Plaintiff claims to represent a class of "thousands of
23 individuals or entities throughout the United States and in many
24 countries" Id., ¶ 27.

25 None of the Defendants is a California corporation, and all
26 three have their principal place of business in Atlanta, Georgia.
27 See First Mot., at 2-3. UPS Ohio does business in the Northern
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1 District of California, but UPS, Inc. and UPS New York do not.
2 Id. at 1. UPS, Inc. only conducts business in Atlanta. Id. The
3 Defendants generally argue that the Northern District of Georgia
4 is a more convenient forum for this case because they reside
5 there, the majority of their documentary evidence is there, and
6 many of the party and non-party witnesses reside in that District.
7 See id. at 2, 5-6.

8 Plaintiff filed the Complaint in this action on May 2, 2007.
9 The Barber Auto plaintiffs filed suit in the Northern District of
10 Alabama on November 15, 2006, and filed an Amended Complaint on
11 February 20, 2007. See Second Mot., Exs. A, B. The Barber Auto
12 plaintiff is not a UPS franchisee, but is a shipper, and claims to
13 represent a class of similarly situated persons. See id., Ex. B,
14 ¶ 3. UPS, Inc. is the Barber Auto defendant. In that case, the
15 plaintiff alleges that UPS, Inc. incorrectly measures the size of
16 packages and subsequently overcharges the shippers. See id., Ex.
17 B, ¶¶ 8-14. The Barber Auto plaintiff initially alleged claims
18 for breach of contract, fraud, fraudulent suppression, unjust
19 enrichment, money had and received, and constructive trust. See
20 id., Ex. A, ¶¶ 22-43. After extensive motion practice, the only
21 surviving claim is for breach of contract. See id., Ex. B, ¶¶ 23-
22 27; Barber Auto, 2007 U.S. Dist. LEXIS 48460, ** 16-17 (N.D. Ala.
23 June 5, 2007) (granting motion for judgment on the pleadings and
24 dismissing certain claims with prejudice).

25 26 **III. DISCUSSION**

27 In the Second Motion, Defendants argue that the Court should
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1 transfer this case to the Northern District of Alabama, based on
2 the "first-to-file" rule. See Second Mot. Persepolis concedes
3 that its case is similar to Barber Auto, and asks the Court to
4 transfer this action to Alabama. See Second Opp'n, at 1. Because
5 both parties agree that the Northern District of Alabama is an
6 appropriate venue for this action, if the Court orders a transfer,
7 it will be to that district, rather than the Northern District of
8 Georgia. The Court therefore DENIES Defendants' First Motion.

9 The first-to-file rule "allows a district court to transfer,
10 stay, or dismiss an action when a similar complaint has already
11 been filed in another federal court." Alltrade, Inc. v. Uniweld
12 Prods., Inc., 946 F.2d 622, 623 (9th Cir. 1991). Although the
13 district court has considerable discretion in applying the rule,
14 it must consider three factors: (1) the chronology of the cases,
15 (2) the similarity of the parties, and (3) the similarity of the
16 issues. See id. at 625-26, 628. Persepolis does not dispute that
17 all three factors are present, or that the first-to-file rule is
18 applicable here. Thus, the only question for the Court to decide
19 is which option – transferring to the Northern District of
20 Alabama, staying the case pending the resolution of Barber Auto,
21 or dismissing without prejudice – is most appropriate.

22 Barber Auto was filed approximately six months before
23 Persepolis filed this suit. The first factor therefore weighs in
24 favor of applying the first-to-file rule, but does not favor any
25 of the choices the rule offers.

26 The second factor favors transfer. The first-to-file rule
27 requires the court in a class action suit to compare the proposed
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1 classes, not their representatives. See Weinstein v. MetLife,
2 Inc., No. 06-cv-04444-SI, 2006 U.S. Dist. LEXIS 83115, *12 (N.D.
3 Cal. Nov. 6, 2006). The class that the Barber Auto plaintiffs
4 seek to represent includes all "persons and/or entities in the
5 United States who have paid defendant any sums of money for
6 increased shipping charge corrections the defendant assessed
7 against them based on the subsequent auditing of the dimensional
8 size of these persons' and/or entities' packages." Second Mot.,
9 Ex. B, ¶ 15(a). Persepolis brought this suit on behalf of a class
10 of all "entities worldwide that operate franchises under the UPS
11 store or Mail Box Etc. brands, or entities who are '6 digit'
12 account customers with UPS, and who have received an upward
13 adjustment from UPS based on UPS' remeasurement of a package."
14 Compl., ¶ 25. The class Persepolis represents here is not limited
15 to the United States, and the class in Barber Auto is not limited
16 to franchisees. Thus, although Persepolis and some other members
17 of its class may also be included in the Barber Auto class, there
18 is not complete identity. The Defendants are also similar, but
19 not identical, as UPS Ohio and UPS New York are named here, but
20 not in Barber Auto. However, as UPS notes, UPS, Inc. is the
21 parent company of both UPS Ohio and UPS New York. Second Mot., at
22 6. Were there complete identity of parties, the Court might be
23 willing to stay this action or dismiss it without prejudice, as
24 Defendants request. Given that the extent of the overlap is
25 unclear, Plaintiff's rights are best preserved by transferring the
26 case to the Northern District of Alabama, where the court that
27 already has a deep familiarity with the facts of Barber Auto is in
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1 a better position to determine whether the two cases should
2 proceed separately.

3 For the same reasons, the third factor also favors
4 transferring rather than dismissing or staying this case.
5 Although both cases involve claims for breach of contract, the
6 precise contract terms in each may differ. Further, Persepolis
7 alleges that Defendants measure the dimensions of packages
8 incorrectly because they rely on an improperly calibrated laser
9 measurement system, and that Defendants knew or should have known
10 the system was inaccurate. These allegations do not appear in the
11 Barber Auto complaints, and may be sufficient to support
12 Persepolis's non-contract claims.

13 The Court agrees with both parties that the first-to-file
14 rule is applicable here. For the foregoing reasons, the Court
15 finds that judicial efficiency and the interests of the parties
16 will be best served by transferring this action to the Northern
17 District of Alabama rather than staying or dismissing it.

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19 **IV. CONCLUSION**

20 For the reasons explained herein, the Court hereby DENIES
21 Defendants' motion to transfer this case to the Northern District
22 of Georgia, and GRANTS Defendants' motion to transfer this case to
23 the Northern District of Alabama. The Court therefore ORDERS the
24 TRANSFER of this case to the United States District Court for the
25 Northern District of Alabama. The Clerk of the Court shall

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1 transfer the file forthwith.

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3 IT IS SO ORDERED.

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5 Dated: September 7, 2007

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UNITED STATES DISTRICT JUDGE